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INTRODUCTION

The fifth amendment protects criminal defendants against double jeopardy.[1] Although the authorities generally agree that a defendant must plead double jeopardy before a court must consider the issue,[2] they disagree over where the burden of proof lies once a defendant raises such a claim. Traditionally, the defendant has had the burden of showing that the two crimes charged are the same in law and fact,[3] but the federal courts have manifested a trend toward changing that rule. Several circuits[4] now hold that once a defendant satisfies the burden of producing evidence by raising a nonfrivolous double jeopardy claim,[5] the burden shifts to the government to persuade the trier of fact by a preponderance of evidence that the crimes

1. The fifth amendment provides in pertinent part "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. Although the amendment refers to jeopardy of life or limb, the Supreme Court has made it clear that the guarantee applies to all crimes. *See Ex Parte* Lange, 85 U.S. (1 Wall.) 163 (1873).

2. The position may be traced to United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833), where Chief Justice Marshall stated that "[a]fter the judgment no subsequent prosecution could be maintained for the same offence, or for any part of it, provided the former conviction was pleaded." *See also* United States v. Stricklin, 591 F.2d 1112, 1117 (5th Cir.) ("It is undisputed that the burden of going forward by putting the double jeopardy claim in issue is and should be on the defendant."), *cert. denied*, 444 U.S. 963 (1979); McClain v. Brown, 587 F.2d 389, 391 (8th Cir. 1978) ("A bar to further prosecution because of former jeopardy is not a jurisdictional defect, but a defense or personal right which must be affirmatively pleaded or is considered waived."); United States v. Young, 503 F.2d 1072, 1074 (3d Cir. 1974) ("It is manifest that a claim of double jeopardy is an affirmative defense which must be raised properly or may be deemed waived"); United States v. Scott, 464 F.2d 832, 833 (D.C. Cir. 1972) ("The constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived."); State v. Cutshall, 278 N.C. 334, 343, 180 S.E.2d 745, 751 (1971) (defendant deemed to have abandoned double jeopardy claim when he failed to plead double jeopardy and to offer evidence in support of that pleading).

3. *See* United States v. Inryco, Inc., 1981-2 TRADE CAS. (CCH) ¶ 64,244 at 74,006 (D. Md. 1981); *see also* notes 15-19 *infra* and accompanying text.

4. *See* note 28 *infra* and accompanying text. *But see* note 29 *infra* and accompanying text.

5. The double jeopardy cases do not discuss the evidentiary strength required to raise a nonfrivolous claim of double jeopardy. Federal courts have, however, denied a frivolous pleading. A claim is frivolous if its " 'insufficiency . . . is so glaring that the court can determine it upon a bare inspection, without argument.' " United States v. Delaney, 8 F. Supp. 224, 227 (1934) (quoting First Natl. Bank v. Lang, 94 Minn. 261, 262, 102 N.W. 700, 701 (1905)). Similarly, "[t]o be frivolous it must appear so incontrovertibly from the mere reading or bare statement. If an argument is required to show that the pleading is bad, it is not frivolous." United States v. Aho, 51 F. Supp. 137, 139 (1943) (quoting The Victorian, 24 Or. 121, 137, 32 P. 1040, 1044 (1893)). Thus, the term "nonfrivolous" assumes a very minimal showing. *See, e.g.,* United States v. Beachner Constr. Co., 555 F. Supp. 1273, 1275 (D. Kan. 1983) (implying that defendant raised a prima facie nonfrivolous claim where "offenses charged in both indictments had the same common objective and several of the same participants").

charged are not the same.[6]

The issue often arises in cases in which a defendant has been charged with a narcotics[7] or price fixing[8] violation and with conspir-

6. Federal courts considering the burden of proof issue in double jeopardy cases have not clearly distinguished between the burden's two components, the burden of producing evidence and the burden of persuasion. "The burden of producing evidence on an issue means the liability to an adverse ruling . . . if evidence on the issue has not been produced. It is usually cast first upon the party who has pleaded the existence of the fact . . . ." C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 784 (2d ed. 1972). In contrast, the burden of persuasion deals with whether the evidence presented is required to convince the trier of fact beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence. *See id.* at 793.

The courts have apparently equated a prima facie nonfrivolous double jeopardy claim with the burden of producing evidence. Once the defendant has made this preliminary showing, the burden of persuasion shifts to the government, which must prove by a preponderance of the evidence that the crimes charged are *not* the same in law and fact. *See, e.g.,* United States v. Kalish, 690 F.2d 1144, 1147 (5th Cir. 1982) (defendant has the burden to tender prima facie nonfrivolous double jeopardy claim, after which the government has the burden to prove by a preponderance of the evidence that the indictments charge different crimes), *cert. denied*, 103 S. Ct. 735 (1983); United States v. Dunbar, 611 F.2d 985, 988 (5th Cir.) ("the district court must determine whether a defendant has tendered a prima facie nonfrivolous double jeopardy claim before shifting the burden of persuasion to the Government"), *cert. denied,* 447 U.S. 926 (1980); United States v. Stricklin, 591 F.2d 1112, 1117 (5th Cir.) (when defendant makes a nonfrivolous showing, the government must prove by a preponderance of the evidence that there were in fact separate offenses before the defendant may be subjected to trial), *cert. denied,* 444 U.S. 963 (1979); United States v. Inmon, 568 F.2d 326, 332 (3d Cir. 1977) (same); United States v. Papa, 533 F.2d 815, 821 (2d Cir.) ("once a defendant introduces sufficient evidence that the two conspiracies alleged were in fact one, the burden shifts to the government to rebut the inference of unity"), *cert. denied,* 429 U.S. 961 (1976); United States v. Beachner Constr. Co., 555 F. Supp. 1273, 1275 (D. Kan. 1983) (when the threshold requirement of advancing a nonfrivolous claim is met, the burden shifts to the government to prove the existence of multiple conspiracies by a preponderance of the evidence); United States v. Rivera, 465 F. Supp. 402, 413 (S.D.N.Y.) ("Only when the defendant has introduced evidence sufficient to demonstrate that the conspiracies were in fact one, does the burden shift to the government to rebut the inference of unity."), *affd. without published opinion sub nom.* United States v. Ramirez, 614 F.2d 1292 (2d Cir. 1979); *cf.* United States v. Bendis, 681 F.2d 561, 564 (9th Cir. 1981), (as an evidentiary concept, the burden of persuasion always lies with the defendant on a double jeopardy claim; but the government's burden of responding to a defendant's claim by going forward with the evidence may amount to a burden of persuasion), *cert. denied*, 103 S. Ct. 306 (1982).

In cases where only a minimal showing is required to establish that the defendant's claim is "non-frivolous," *see* note 5 *supra*, this Note does not dispute the courts' characterization of the burden of proof. But where the courts contemplate more extensive showings as a prerequisite to satisfying the burden of producing evidence, this Note argues that both elements of the burden of proof should lie with the government. In *Stricklin*, for example, the court suggested that the defendant, in order to establish his case, "might find it necessary to offer his own testimony at the pretrial hearing." 591 F.2d at 1118. This Note concludes that this type of evidentiary burden is constitutionally and practically suspect. *See* notes 31-85 *infra* and accompanying text. Thus, the burden of proof — whether characterized as a burden of producing evidence or as a burden of persuasion — should fall on the government once the defendant has made a *minimal* showing that a trial for a second charged offense would subject him to double jeopardy. For convenience, the Note describes the defendant's minimal burden in terms of "shifting the burden of proof" to the government.

7. *See, e.g.,* United States v. Inmon, 568 F.2d 326 (3d Cir. 1977). In *Inmon*, two indictments were returned against the defendant on the same day. The first charged that Inmon conspired with nine codefendants and other unindicted and some unnamed co-conspirators to distribute and possess, with intent to distribute, heroin in violation of 21 U.S.C. § 841(a)(1) (1976). The second charged that he conspired with seventeen codefendants and other

acy to violate the law involved. Later, the government enters a second substantive charge and a second conspiracy charge. The defendant then contests the second conspiracy charge by claiming former jeopardy, arguing that the violations alleged were part of the originally charged conspiracy. Since determination of the conspiracy's scope is a mixed question of law and fact,[9] the question of who will bear the burden of proof is important.

This Note argues that once the defendant raises a nonfrivolous double jeopardy claim that turns on a question of fact, the government should have the burden of proving that the two crimes charged are actually different. Part I traces the development of the law and the major factors behind recent federal court scrutiny of the traditional rule. Part II argues that constitutional considerations require courts to shift the burden of proof to the government, not only when practical considerations suggest the shift, but in all cases turning on questions of fact. Finally, Part III reconciles this allocation with the well-established criminal collateral estoppel rule that requires the defendant to show identity of the relevant issues.

I. Development of the Law

The double jeopardy clause serves several purposes.[10] It protects

unindicted and some unnamed co-conspirators to violate the same statute. The first conspiracy allegedly continued from September 1, 1975 to April 4, 1976 and the second from February 1, 1975 to July 14, 1976, the date the indictment was returned. While Inmon was the only defendant charged in both indictments, the unindicted co-conspirators constituted an additional overlap. Inmon pleaded guilty to the first conspiracy charge and to the substantive charge. He later moved to dismiss the second indictment on the ground that his guilty plea to the first had put him in former jeopardy.

8. *See, e.g.,* United States v. Inryco, Inc. 1981-2 Trade Cas. (CCH) ¶64,244 (D. Md. 1981). In *Inryco*, VSL Corporation, three other corporations and two individuals were charged in the United States District Court for the District of Maryland with conspiracy to restrain trade in the post-tensioning (reinforcement of structural concrete) industry in the Eastern states from April 1977, to May 1978. Four additional indictments in the California, Colorado and Florida districts charged VSL with conspiring to restrain trade in post-tensioning on the construction of highways in the southwest from 1970 to December 1974, commercial structures in the southwest from May 1974, through 1976, commercial structures in the Rocky Mountain states, and commercial structures in Florida. After jeopardy attached in both the California cases and in the Florida case, VSL filed a motion in the Maryland district alleging that all the activities charged in the various indictments arose out of a single national conspiracy rather than independent regional conspiracies and that the Maryland indictment violated the double jeopardy clause.

9. The question may involve the definition of conspiracy, as well as legal precedents concerning the scope of conspiracy in terms of time or participants. However, the application of these legal issues will involve factual questions, and the burden of proof as to the factual elements will be important to the overall question.

10. *See, e.g.,* Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 454 (1977) (stating that "the double jeopardy clause now serves a variety of important functions"); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 84 (commenting on the Supreme Court's inability to determine the "heart" of double jeopardy: "The 'heart' of double jeopardy is sometimes identified as the ban on reprosecution following conviction; in other cases it is said to be the ban on reprosecution following acquittal.") (footnotes omitted).

defendants previously found guilty of an offense from being punished again for the same offense,[11] while protecting defendants previously found innocent from "repeated attempts [by the state] to convict. . . . enhancing the possibility that even though innocent [they] may be found guilty."[12] The clause also "protects interests wholly unrelated to the propriety of any subsequent conviction."[13] The protection ensures the individual that "he will not be forced. . . . to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[14] The double jeopardy clause is thus properly invoked whenever a defendant is prosecuted for an offense identical in fact and in law to an offense with which he was previously charged.[15]

Before 1977, most courts[16] placed the burden of proving a double jeopardy claim on the defendant.[17] Because double jeopardy claims

11. *See, e.g.,* North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (the double jeopardy clause "protects [a defendant] against a second prosecution for the same offense after conviction").

12. Green v. United States, 355 U.S. 184, 187-88 (1957).

13. Abney v. United States, 431 U.S. 651, 661 (1977).

14. 431 U.S. at 661.

15. *See, e.g.,* United States v. Ewell, 383 U.S. 116, 124-25 (1966); United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980); Chambers v. Wyrick, 539 F.2d 667, 668 (8th Cir. 1976), *cert. denied,* 429 U.S. 1107 (1977); Dryden v. United States, 403 F.2d 1008, 1009 (5th Cir. 1968); State v. Freeman, 162 N.C. 491, 493, 77 S.E. 780, 782 (1913). The courts have used various methods to determine whether two offenses are the same in fact and in law. *See, e.g.,* Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 269-77 (1965).

16. The exception was the Second Circuit. In United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), the court held that the facts presented were "sufficient to satisfy [defendant's] burden of going forward, of putting his double jeopardy rights at issue . . . [and] the burden shifts to the government to rebut the presumption." 503 F.2d at 986. The court was, however, somewhat indefinite in placing the burden on the government. The court stated that "where the offense charged is conspiracy to violate federal law other than the narcotics laws, . . . the defendant will bear a higher burden of proving that his double jeopardy right has been abridged." 503 F.2d at 987. Several courts have suggested that *Mallah* applies only to narcotics conspiracy cases. *See, e.g.,* United States v. Tercero, 580 F.2d 312, 314-15 (8th Cir. 1978); United States v. Papa, 533 F.2d 815, 820-21 (2d Cir. 1976), *cert. denied,* 429 U.S. 961 (1976); United States v. Price, 533 F. Supp. 1183, 1187 (W.D.N.Y. 1982). Nevertheless, other courts have cited *Mallah* as authority for shifting the burden to the government when the defendant raises a nonfrivolous double jeopardy claim. *See, e.g.,* United States v. Castro, 629 F.2d 456, 466 (7th Cir. 1980) (Fairchild, C.J., concurring); United States v. Parker, 582 F.2d 953, 954 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); United States v. Tercero, 580 F.2d 312, 315 n.12 (8th Cir. 1978); United States v. Inmon, 568 F.2d 326, 331-32 (3d Cir. 1977); United States v. Papa, 533 F.2d 815, 821 (2d Cir. 1976).

17. The rule is found in the federal circuits at least as early as Kastel v. United States, 23 F.2d 156 (2d Cir. 1927), where the court derived authority from earlier state court rulings. *See* Barber v. State, 151 Ala. 56, 43 So. 808 (1907); Storm v. Territory, 12 Ariz. 109, 99 P. 275, *aff'd.* 170 F. 423 (9th Cir. 1909); Jacobs v. State, 100 Ark. 591, 141 S.W. 489 (1911); Harlan v. State, 190 Ind. 322, 130 N.E. 413 (1921); Commonwealth v. Wermouth, 174 Mass. 74, 54 N.E. 352 (1899); Price v. State, 104 Miss. 288, 61 So. 314 (1913); State v. Ackerman, 64 N.J.L. 99, 45 A. 27 (N.J. Sup. Ct. 1899); Territory v. West, 14 N.M. 546, 99 P. 343 (1908); State v. Williams, 43 Wash. 505, 86 P. 847 (1906); *cf.* note 30 *infra* (citing recent state court cases).

were often reviewable only after a trial on the merits,[18] the defendant could use the records of the two trials to show that both involved the same factual and legal offense.[19] Thus, the burden of proof did not prevent the defendant from securing what was at the time the full protection of the double jeopardy clause.

In 1977, however, *Abney v. United States*[20] broadened the scope of the clause's protection by altering the point at which a double jeopardy claim could be reviewed. The Supreme Court reasoned that the double jeopardy clause "assures an individual that . . . he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[21] The Court therefore held that pretrial orders rejecting double jeopardy claims are final decisions that can be reviewed before exposure to a second trial.[22] Although "*Abney* may be applied without serious complexity where the indictments and the record from the previous trial are sufficiently explicit to provide for clear-cut determination of the double jeopardy claim"[23] more difficult claims must be resolved by a pretrial hearing.[24] If a defendant asserts the right defined in *Abney* by making a double jeopardy claim *before* undergoing a second trial, he will no longer be able to prove his claim by relying on the records developed at both trials. In order to carry the burden of proof, the defendant would have to introduce other evidence to show that the potential second trial would be factually and legally identical to the first. Under these circumstances, the defendant who attempts to raise a double jeopardy claim before a second trial may face what is, as a practical matter, an impossible task.[25] Thus, improper allocation of the burden of proof may undermine the constitutional right identified by the Supreme Court in *Abney*.[26]

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18. United States v. Stricklin, 591 F.2d 1112, 1124 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979).

19. 591 F.2d at 1124.

20. 431 U.S. 651 (1977).

21. 431 U.S. at 661; *see also* Green v. United States, 355 U.S. 184, 187-88 (1957).

22. 431 U.S. at 662. The Court reasoned that the guarantee against being subjected to a second trial would be lost if the defendant could appeal an adverse ruling only after the second trial had concluded. 431 U.S. at 661-62.

23. United States v. Stricklin, 591 F.2d 1112, 1117 (5th Cir.), *cert. denied,* 444 U.S. 963 (1979).

24. *See* United States v. Stricklin, 591 F.2d 1112, 1117 (5th Cir.) ("It is necessary. . . to establish procedural rules for an *Abney* pretrial double jeopardy hearing . . . ."), *cert. denied,* 444 U.S. 963 (1979); United States v. Inmon, 568 F.2d 326, 329 (3d Cir. 1977) ("[T]here must be a pretrial proceeding in which an appropriate record may be made to test a double jeopardy claim . . . .").

25. *See* notes 32-38 *infra* and accompanying text.

26. If the defendant raises a meritorious double jeopardy claim but is unable as a practical matter to prove it, *see* notes 31-85 *infra* and accompanying text, the burden of proof will have effectively undermined his constitutional rights: "[E]ven if the accused is acquitted, or, if con-

Ultimately, the rule that places the burden of proving a double jeopardy claim on the defendant raises significant constitutional and practical difficulties.[27] These problems have led some courts to shift the burden of persuasion to the government in double jeopardy claims turning on questions of fact.[28] Other federal[29] and state[30]

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victed, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney*, 431 U.S. at 662 (footnote omitted); *see also* notes 39-56 *infra* and accompanying text.

27. *See* notes 39-85 *infra* and accompanying text.

28. Since *Abney*, the Fifth and Sixth Circuits have shifted from adherence to the traditional rule and placed the burden on the Government. In United States v. Stricklin, 591 F.2d 1112, 1118 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979), the Fifth Circuit, citing United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), and United States v. Inmon, 568 F.2d 326 (3d Cir. 1977), held that "the burden of establishing that the indictments charge separate crimes is most equitably placed on the government when a defendant has made a nonfrivolous showing that an indictment charges the same offenses as that for which he was formerly placed in jeopardy." The court adhered to this rule in four later cases. United States v. Kalish, 690 F.2d 1144, 1147 (1982), *cert. denied*, 103 S. Ct. 735 (1983); United States v. Futch, 637 F.2d 386, 389 (5th Cir. Unit B 1981); United States v. Tammaro, 636 F.2d 100, 103 (5th Cir. 1981); United States v. Dunbar, 611 F.2d 985, 988 (5th Cir. 1980), *cert. denied*, 447 U.S. 926 (1980). The Sixth Circuit has also adopted the rule that the burden of proof shifts to the government after the defendant raises a nonfrivolous double jeopardy claim. United States v. Jabara, 644 F.2d 574, 576-77 (6th Cir. 1981).

The First, Third and Eleventh Circuits have adopted the new rule in cases of first impression. *See* United States v. Booth, 673 F.2d 27, 30-31 (1st Cir. 1982), *cert. denied*, 456 U.S. 978 (1982); United States v. Hewitt, 663 F.2d 1381, 1387 n.7 (11th Cir. 1981); United States v. Venable, 585 F.2d 71, 74 n.5 (3d Cir. 1978); United States v. Inmon, 568 F.2d 326, 331-32 (3d Cir. 1977).

The status of the burden of proof is not clear in the Eighth and Ninth Circuits. The Eighth Circuit Court of Appeals placed the burden on the defendant in Chambers v. Wyrick, 539 F.2d 667, 668 (8th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977), but in United States v. Tercero, 580 F.2d 312, 315 n.12 (8th Cir. 1978), the court cited United States v. Papa, 533 F.2d 815 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976), and United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), for the rule that the burden shifts to the government. The rule appears only in a footnote to the *Tercero* decision, because the district court had not reached the issue of the burden of proof. As dictum, this citation indicates the direction in which the court is moving but would not be binding as precedent. The Ninth Circuit's position appears to be changing, but it is not completely clear where the burden now lies. Through 1980 the burden was placed on the defendant. *See* United States v. Cox, 633 F.2d 871, 876 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). In United States v. Bendis, 681 F.2d 561, 564 (9th Cir. 1981), the court adhered to its earlier position that "the burden of persuasion generally does not shift and would appear to rest always with the defendant on a double jeopardy claim." However, the court considered opinions from other circuits and modified its position somewhat. It agreed that once the defendant made a nonfrivolous showing of former jeopardy, the government would be required to tender evidence indicating separate offenses. It went on to state, however, that while the government's burden might in practical effect amount to a burden of persuasion, it is "more properly characterized as a burden to go forward with the evidence." 681 F.2d at 564.

29. In United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980), the Seventh Circuit adhered to the traditional rule and placed the burden on the defendant, although a concurring opinion argued that the burden should shift to the state after a sufficient showing by the defendant. 629 F.2d at 466 (Fairchild, C.J., concurring). More recently, the Seventh Circuit has again held that that the burden rests upon the defendant. United States v. West, 670 F.2d 675, 681 (7th Cir. 1982), *cert. denied*, 457 U.S. 1124, 1139 (1982).

The Tenth Circuit has consistently held that the defendant has the burden of proving his double jeopardy claim. *See* United States v. Pluckett, 692 F.2d 663, 668 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 579 (1982) *and* 103 S. Ct. 1276 (1983); United States v. Eggert, 624 F.2d 973,

courts have retained the traditional allocation of the burden of proof. Part II will evaluate the practical and constitutional rationales that justify this shift.

II. Practical and Constitutional Bases for Shifting the Burden of Proof to the Government

Both practical and constitutional considerations mandate that the burden of proof in double jeopardy claims be shifted to the government. Taken alone, practical reasons justify this shift only in those instances in which practical problems actually exist. Constitutional considerations, however, compel the conclusion that the burden of proof should be shifted to the government in *all* cases in which the resolution of a nonfrivolous double jeopardy claim turns on a question of fact.

A. *Practical Bases*

The procedural shift to pretrial appeals embodied in *Abney v. United States*[31] figures prominently in the reasoning of those courts that have shifted the burden of proof to the government. If the defendant wishes to raise his double jeopardy claim before the record has been developed at a second trial, he may be unable to carry the requisite burden. Therefore, he will not be able to assert effectively his right to avoid a second trial for the same offense. In particular, courts question the ability of defendants to prove that the two charges are in fact for the same crime "without access to the proof on which the government propose[s] to rely."[32] This is particularly true when the government has exclusive access to materials that might determine the outcome of the defendant's claim.[33] Some courts also

975 (10th Cir. 1980); United States v. Wilshire Oil Co., 427 F.2d 969, 976 n.12 (10th Cir. 1970), *cert. denied,* 400 U.S. 829 (1970).

The issue has not been reached in the Fourth Circuit, United States v. Inryco, Inc., 1981-2 Trade Cas. (CCH) ¶ 64,244 at 74,007 (D. Md. 1981), and there appear to be no cases on the issue in the District of Columbia Circuit.

30. State courts have generally placed the burden on the defendant, both before and after *Abney*. *See, e.g.,* Sawyers v. State, 168 Ind. App. 149, 341 N.E.2d 810, 814 (Ind. App. 1976); Beard v. State, 164 Ind. App. 205, 327 N.E.2d 629, 631 (Ind. App. 1975); Commonwealth v. Gonzalez, 388 Mass. 865, 868, 448 N.E.2d 759, 762 (1983); State v. Moller, 276 Minn. 185, 187, 149 N.W.2d 274, 276 (1967); State v. Glover, 500 S.W.2d 271, 273 (Mo. App. 1973); State v. Cutshall, 278 N.C. 334, 343, 180 S.E.2d 745, 751 (1971); State v. Heinz, 119 N.H. 717, 720, 407 A.2d 814, 816 (1979); Shaffer v. State, 477 S.W.2d 873, 877 (Tex. Crim. App. 1971); State v. Ridgley, 70 Wash. 2d 555, 557, 424 P.2d 632, 633 (1967); *see also* state cases cited in note 17 *supra*. *But see* State v. Lee, 210 Kan. 753, 756, 504 P.2d 202, 205 (1972).

31. 431 U.S. 651 (1977).

32. United States v. Inmon, 568 F.2d 326, 329 (3d Cir. 1977); *see also* United States v. Jabara, 644 F.2d 574, 576-77 (6th Cir. 1981); United States v. Stricklin, 591 F.2d 1112, 1118 (5th Cir. 1979), *cert. denied,* 444 U.S. 963 (1979).

33. United States v. Stricklin, 591 F.2d 1112, 1124 (5th Cir. 1979), *cert. denied.,* 444 U.S. 963 (1979).

noted, among other things, that it was "impractical" to place the burden on the defendant because of the defendant's inability to offer immunity to witnesses.[34] Absent the power to offer immunity, defendants could encounter serious difficulties in obtaining testimony needed to demonstrate the identity of the new and old charges. Because the government's control over the particularity of the indictment renders the government responsible for the practical difficulties confronting the defendant, some courts have concluded that the government ought to bear the burden of proving the issue raised by the indictment's imprecision.[35]

Because the courts have based this shift largely on practical considerations, it has been narrowly interpreted. In *United States v. Rumpf*,[36] the Tenth Circuit held that *Abney* did not require that the burden be lifted from the defendant but recognized that it might shift under circumstances in which proof was in the control of the prosecution or could be established only by the use of government witnesses.[37] The court treated the same factors that led other courts to shift the burden to the government as unusual circumstances that might require an ad hoc solution, but not a new rule. Even in circuits where the burden has been shifted to the government, the scope of the shift has often been limited to those cases in which practical difficulties warranted it.[38] Although practical considerations and unusual circumstances will justify a shift only in particular cases, constitutional concerns compel more sweeping change.

B. *Constitutional Considerations*

1. *Procedural Choices and the Burden of Proof*

The Supreme Court in *Abney v. United States*[39] showed its willingness to tailor procedure to protect the rights that the double jeop-

34. United States v. Stricklin, 591 F.2d 1112, 1118 (5th Cir. 1974), *cert. denied,* 444 U.S. 963 (1979); United States v. Inmon, 568 F.2d 326, 329-30 (3d Cir. 1977).

35. United States v. Stricklin, 591 F.2d 1112, 1119 (5th Cir. 1974), *cert. denied,* 444 U.S. 963 (1979); United States v. Inmon, 568 F.2d 326, 332 (3d Cir. 1977). This is particularly true in narcotics conspiracy cases, where the government can carve one large conspiracy into several smaller crimes by choosing one set of overt actions in one indictment and a different set in another. *See* United States v. Tercero, 580 F.2d 312 (8th Cir. 1978); *see also* United States v. Papa, 533 F.2d 815 (2d Cir.), *cert. denied,* 429 U.S. 961 (1976); United States v. Mallah, 503 F.2d 971, 987 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975); United States v. Price, 533 F. Supp. 1183, 1187 (W.D.N.Y. 1982).

36. 576 F.2d 818 (10th Cir.), *cert. denied,* 439 U.S. 893 (1978).

37. 576 F.2d at 823.

38. *See* United States v. Papa, 533 F.2d 815, 820 (2d Cir.), *cert. denied,* 429 U.S. 961 (1976); United States v. Mallah, 503 F.2d 971, 987 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975); United States v. Price, 533 F. Supp. 1183, 1187 (W.D.N.Y. 1982) (stating that the rule was modified due to the unique structure of a narcotics conspiracy).

39. 431 U.S. 651 (1977).

ardy clause confers upon a criminal defendant. The issue was whether a pretrial denial of a double jeopardy claim was a final decision appealable pursuant to 28 U.S.C. § 1291.[40] The Court held that the clause was more than a guarantee against double punishment. It was also a guarantee against being tried twice for the same offense.[41] Based on that conclusion, the Court held that "if a criminal defendant is to . . . enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before . . . subsequent exposure occurs."[42]

Although the Court in *Abney* defined procedure in a way that protected the criminal defendant against double jeopardy, it did not explain how far it was willing to go in quest of that protection. Of course, not all procedure must be structured so as to maximize constitutional protections. If such a requirement did exist, courts would always allocate the burden of proof in a manner that favored the party for whose benefit the protection was being invoked. However, the protected party often bears the burden of proving facts requisite to his constitutional claim.[43] Of course, the Court has also secured certain constitutional rights by placing the burden of proof on the government,[44] but a criterion for selecting required levels of protec-

40. 28 U.S.C. § 1291 (1976) ("The courts of appeals shall have jurisdiction from all *final decisions* of the district courts of the United States . . . .") (emphasis added); *see Abney*, 431 U.S. at 656-62.

41. 431 U.S. at 660-61.

42. 431 U.S. at 662.

43. *See, e.g.,* United States v. Goodwin, 102 S.Ct. 2485, 2494 (1982) (no presumption of due process violation through prosecutorial vindictiveness); Swain v. Alabama, 380 U.S. 202, 226 (1965) (burden on defendant to show abuse of the jury selection process); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (burden of proof on property owner to show a taking).

44. The Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), discussed the custodial interrogation of an arrestee who had no counsel present. The Court stated that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475; *see also* Lego v. Twomey, 404 U.S. 477, 489 (1972) (stating that "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary").

Similarly, the burden of proof lies with the government in the context of warrantless searches. "When the prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (citing Wren v. United States, 352 F.2d 617 (10th Cir. 1965)); Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1965); Judd v. United States, 190 F.2d 649 (D.C. Cir 1951); Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

The court has also placed the burden of proof on the government in order to protect a defendant's sixth amendment right to counsel. Where that right is violated by the absence of counsel at a post-indictment lineup, the government has the burden of proving that in-court identifications were not based on the lineup identification. *See* United States v. Wade, 388 U.S. 218, 239-40 (1967).

tion must be developed before one can conclude that that the guarantee against double jeopardy falls within this category.

Although the Court has never articulated such a criterion, *Abney* suggests one: A constitutional protection should not be defeated by the procedure required to invoke it.[45] In holding that a denial of a double jeopardy claim could be appealed before trial, the Court noted that the guarantee against double jeopardy includes protection against a second trial. It concluded that this aspect of the guarantee's protection "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken . . . ."[46] Rather than allow the loss of that protection, the Court defined the procedure to insure that the defendant could invoke his constitutional rights effectively.

The Court reached a similar conclusion in *Hoffman v. United States*,[47] which considered the proof required for a witness' claim against testimonial compulsion. The Court held that "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."[48] Again, the Court indicated that it would not allow a constitutional protection to be undermined by the procedure required to invoke it.[49]

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45. Note that the cases cited at note 43 *supra* — in which the burden is on the protected party — do not violate the principle presented here. A property owner's burden in showing a taking does not itself defeat a property interest of the owner. Nor does the burden in showing prosecutorial vindictiveness increase vindictiveness or otherwise directly damage the defendant's interest in a fair trial. Lastly, the burden of showing abuse in jury selection does not itself lead to a biased jury.

46. 431 U.S. at 662.

47. 341 U.S. 479 (1951).

48. 341 U.S. at 486.

49. Several other areas of procedure exemplify the rule without stating it. One such area is the procedure for contesting personal jurisdiction. A defendant wishing to contest jurisdiction in a civil case could be forced to do so in the very court whose jurisdiction he finds objectionable. Such a procedure would require a defendant to submit to a limited level of jurisdiction in order to exercise his right to contest jurisdiction. Rather than permitting procedure to defeat the protection, the courts allow a collateral attack. When judgment is sought in a second state, based on a default judgment in the state whose jurisdiction is contested, the courts of the second state determine the propriety of the first state's claim of jurisdiction. *See, e.g.,* Adam v. Saenger, 303 U.S. 59, 62 (1938).

The principle is also exemplified by the procedure for obtaining a witness under compulsory process. Although a defendant may be required to show some particularized need for the witness and indicate the subject of the witness' testimony, the showing required cannot be too great. If too much information were required, compulsory process could never be obtained, because the defendant would need to obtain the witness in order to provide the required information. Instead, the state "cannot require that a defendant provide greater detail than is reasonable under the circumstances." Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 276 (1975). *See generally* Westen at 265-76.

The court has also followed the rule in the welfare area. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court noted that those qualified to receive welfare benefits had a statutory entitlement to those benefits. If termination could be contested only at a post-termi-

Among other things, the double jeopardy clause protects the defendant from the "personal strain, public embarrassment and expense"[50] that accompanies a second trial. Since *Abney*, the resolution of double jeopardy claims no longer requires a second trial. Rather, courts may now decide the double jeopardy issue at a pretrial hearing.[51] If practical considerations like the government's superior access to relevant evidence[52] would prevent a defendant from establishing an otherwise meritorious double jeopardy claim during the pretrial hearing,[53] a procedural rule that forces him to bear the burden of proof will defeat his right to avoid a second trial for the same offense. A court should not allocate the burden of proof in a way that would undermine the constitutional protection identified in *Abney*.[54]

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nation hearing, the procedure would defeat the entitlement. "[T]ermination of aid pending resolution . . . may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264 (emphasis in original). Rather than allow the procedure to defeat the entitlement, the court held that hearings must be held before benefits are terminated. 397 U.S. at 266.

The principle has also been applied to the procedural rules of state courts. In Reece v. Georgia, 350 U.S. 85 (1955), the Court held that Georgia's procedure allowing only preindictment challenges to the composition of a grand jury could not be allowed to defeat a defendant's right to contest that composition. It has also been argued that in civil claims under federal law, state procedural rules so burdensome as to violate due process must be rejected. *See* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 971-80 (1965).

50. Abney v. United States, 431 U.S. 653, 661 (1977); *see also* Serfass v. United States, 420 U.S. 377, 391 (1975) ("When a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial.").

51. *See* note 24 *supra* and accompanying text.

52. *See* notes 31-38 *supra* and accompanying text.

53. *See* notes 23-26 *supra* and accompanying text.

54. *Cf.* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* in CRIMINAL JUSTICE IN OUR TIME (A. Howard ed. 1965). Before Miranda v. Arizona, 384 U.S. 436 (1966), was decided, Professor Kamisar argued that the defendant's privilege against self-incrimination at trial required that the protection be extended to pretrial questioning. Custodial interrogation should not take place under conditions undermining the freedom to speak or not to speak. "One cannot but wonder how often the availability of the privilege . . ., once the accused reaches the safety and comfort of the mansion, only furnishes the State with an additional incentive for proving the charge against him out of his own mouth before he leaves the gatehouse [police station]." *Id.* at 25.

Later, the Supreme Court analyzed *Miranda* in Michigan v. Tucker, 417 U.S. 433 (1974). "The [*Miranda*] Court recognized that these procedural safeguards [on custodial interrogation] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." 417 U.S. at 444; *see also* Coleman v. Alabama, 399 U.S. 1, 7 (1970) (Presence of counsel at preliminary hearings is "necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."); Crooker v. California, 357 U.S. 433, 443 (1958) (Douglas, J., dissenting) ("The right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself."); *In Re* Groban, 352 U.S. 330, 344 (1957) (Black, J., dissenting) ("The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."). *Compare* United States v. Wade, 388 U.S. 218, 227 (1967) ("The presence of counsel at . . . critical confrontations . . . operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."), *with* 388 U.S. at 228 (Scientific analyses

Moreover, pretrial hearings, like trials, involve personal strain, public embarrassment and expense, burdens that the double jeopardy clause is designed to prevent. The fact that a pretrial plea of former jeopardy is an issue collateral to the criminal prosecution means that the double jeopardy clause does not preclude the burdens inherent in the pretrial hearing.[55] Nevertheless, the clause ought to inform the allocation of the burden of proof; the burden imposed on defendant should not, if possible, duplicate the strain of a second trial.

A rule that completely exempted the defendant from the pretrial hearing would be the simplest way to protect his right to avoid a second trial for the same offense, but it would be unreasonable to suggest that charges be dropped simply on the basis of a nonfrivolous double jeopardy claim. A hearing must be held, but the burden of proof should be placed on the government; this alternative is the one that imposes the least restriction on the defendant's right.[56] The

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"are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.").

55. The pretrial hearing does not put the defendant in former jeopardy because it does not implicate the merits of the offense with which he is charged. The Supreme Court has emphasized that

> the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. . . . [T]he matters embraced in the trial court's pretrial order here are truly collateral to the criminal prosecution itself in the sense that they will not "affect, or . . . be affected by, decision of the merits of this case."

Abney v. United States, 431 U.S. 651, 659-60 (1977) (quoting Cohen v. Beneficial Indus. Loan, 337 U.S. 541, 546 (1949)) (citations omitted); *cf.* United States v. Inmon, 568 F.2d 326, 332 (3d Cir. 1977) ("As to the evidentiary burden, since the fifth amendment double jeopardy privilege is just that — a personal and waivable privilege — rather than an element of the crime, we think it inappropriate to require the government to prove the separateness of the offenses beyond a reasonable doubt.").

56. *Cf.* NAACP v. Alabama, 377 U.S. 288, 307 (1964) (a state's statute may not "sweep unnecessarily broadly and thereby invade an area of protected freedoms"); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (invalidated a state requirement because the state's goal could "be more narrowly achieved" and "must be viewed in light of less drastic means for achieving the same basic purpose"); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (overturned a municipal ordinance affecting commerce because "reasonable nondiscriminatory alternatives . . . [were] available"); Near v. Minnesota, 283 U.S. 697 (1931) (prior restraint disallowed since the less restrictive alternative of subsequent punishment under libel laws was available); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1036 (1974) ("[A] statute that intrudes upon an individual interest may be susceptible to constitutional attack if alternative means exist for accomplishing the state's purpose in a manner less restrictive of an individual interest."); Note, *Legislative Inquiry into Political Activity: First Amendment Immunity from Committee Interrogation*, 65 YALE L.J. 1159, 1173 (1956) ("The policy against unnecessary governmental restriction of First Amendment rights requires the courts to strike down restrictions unless they meet two requirements: they must be imposed for some substantial public purpose, and must be necessary for the purpose"); *Id.* at 1174-75 ("[E]ven if the end is proper, Congress cannot

defendant will be required to present less evidence than he would if he had to carry the burden of proof. Indeed, if the burden is on the government, the defendant might not be required to make any showing at all. If the government fails to prove its case, the defendant will prevail. This approach to allocating the burden of proof would minimize the risk that a defendant would be forced to undergo a second trial for the same offense, and it would also prevent the pretrial hearing itself from imposing an onerous burden on the defendant.

2. *Self-Incrimination*

Another rationale for placing the burden of proof on the government lies in the possible conflict between placing the burden on the defendant and the defendant's privilege against self-incrimination. A defendant who has the burden of proof might deem it necessary to testify in order to demonstrate the identity of the relevant law and facts. The defendant's pretrial testimony in support of his double jeopardy claim may prove to be self-incriminating.[57] If so, the defendant has been forced to give up his privilege against self-incrimination in order to assert his guarantee against double jeopardy.

The problem here is similar to the one that appears when a defendant is required to establish his standing to suppress illegally obtained evidence by showing, at a pretrial hearing, his connection with the evidence. Clearly, a showing of this nature could be self-incriminating. In *Simmons v. United States*,[58] the Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another."[59] The Court recognized the problem but indicated that simply prohibiting use of the defendant's pretrial testimony at trial would solve the problem.[60]

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pursue it by means that abridge First Amendment freedoms if the end could be substantially achieved without unreasonable difficulty by means that would abridge such freedom less.").

57. *See* United States v. Inmon, 568 F.2d 326 (3d Cir. 1977). The court noted that if the double jeopardy burden were on the defendant, he "would be required to prove facts establishing the charge of conspiracy to which he pleaded guilty and to prove facts establishing the second conspiracy as well." 568 F.2d at 329. The defendant would have to establish the existence of a larger agreement than those on which the conspiracy charges were based. He would have to prove one agreement encompassing all the individuals and activities involved. He would also have to show that the first conspiracy extended beyond the date charged and that the second began before the date charged. He would thereby make himself responsible for any acts done by co-conspirators in furtherence of the conspiracies during those increased timespans.

58. 390 U.S. 377 (1968).

59. 390 U.S. at 394.

60. 390 U.S. at 394. The Third Circuit considered the conflict in the double jeopardy context in United States v. Inmon, 568 F.2d 326 (3d Cir. 1977), a case in which the court held that the government had the burden of proof. The court considered the possibility that, even with the burden on the government, a defendant might choose to testify at the double jeopardy hearing and held that he could "not be required, as the cost of litigating . . . [his] fifth amendment double jeopardy claim, to waive his fifth amendment privilege against self-incrimination

While the Court was willing to strike such a balance in a fourth amendment suppression hearing, the double jeopardy context is distinct and thus need not be governed by the same rule. In suppression hearings, complete deference to a defendant's fifth amendment rights would require a return to automatic standing, a doctrine discarded by the Supreme Court in *United States v. Salvucci*.[61] The automatic standing doctrine allowed a defendant to challenge the admissibility of illegally obtained evidence relevant to a possessory offense without asserting his possessory interest in the seized object.[62] The Court concluded, however, that such a doctrine extends fourth amendment protection to defendants who have suffered no violation of their fourth amendment rights.[63] Automatic standing improperly enhanced the likelihood that these defendants would succeed on suppression motions and thus increased the probability that the charges would be dismissed. In the context of a double jeopardy hearing, deference to the defendant's fifth amendment rights does not result in automatic extension of double jeopardy protection to defendants who do not merit such protection. To be sure, allocation of the burden of proof could affect the resolution of a double jeopardy claim. But an interest in avoiding the burden of proof is qualitatively different from an interest in preventing a "windfall to defendants whose Fourth Amendment rights have *not* been violated."[64] Thus, the suppression context and the double jeopardy context are not parallel and do not require application of the same principle.

In addition, the problems that arise as a result of the *Simmons* approach indicate that a different balance should be struck in the double jeopardy context. *Simmons* has been criticized as offering inadequate protection to the defendant's privilege against self-incrimination, because it allows the defendant's testimony to be used for impeachment purposes.[65] Even if this use were banned,[66] some ques-

in a later trial." 568 F.2d at 333. As in *Simmons*, the *Inmon* court concluded that it could avoid the conflict by forbidding trial use of the defendant's pretrial testimony. Since the court had placed the burden on the government, it is not clear whether the court would have considered forbidding the use of pretrial testimony in the absence of a shifted burden.

61. 448 U.S. 83 (1980); *see also* Rawlings v. Kentucky, 448 U.S. 98 (1980).

62. *See* Jones v. United States, 362 U.S. 257 (1960).

63. *Salvucci*, 448 U.S. at 95.

64. 448 U.S. at 95 (emphasis in original).

65. The dissenters in United States v. Salvucci, 448 U.S. 83, 96 (1980), objected to overruling automatic standing to assert a fourth amendment violation, because they did not agree with the majority's claim that *Simmons* protected the defendant's fifth amendment rights. The testimony could still be used to impeach the defendant should he testify at trial to his lack of connection with the evidence he had sought to suppress. That problem would carry over to the double jeopardy context should the defendant testify at trial that the crimes charged in the indictments were distinct after having tried to prove that they were the same in order to invoke the protection of the double jeopardy clause.

66. In *Salvucci*, the Court left open the possibility that impeachment use could be banned. 448 U.S. at 94.

tion would remain as to whether the ban on either impeachment use or use in the prosecution's case would be effective. To be effective, the ban must not only prevent use of the defendant's testimony, but must also prevent the use of any evidence derived from that testimony.[67] Weakness produced by exceptions[68] to the derivative use doctrine may be particularly acute in the double jeopardy context. While derivative use immunity places a heavy burden on the government to prove an independent source for the evidence offered at trial,[69] a ban on derivative use in a double jeopardy hearing cannot be sufficiently guaranteed. The prosecution may gain from the defendant's testimony an understanding of how the charged crime relates to other crimes. This knowledge will not itself be offered as evidence. Thus, despite the fact that the defendant's testimony will have been very useful to the government,[70] it will be unprotected by the derivative use ban because its connection to the development of other evidence is likely to be viewed as tenuous.[71]

Assuming for the sake of argument that the defendant's testimony at the pretrial hearing would be completely protected, the bal-

67. Only the combination of "immunity from use *and derivative use* is coextensive with the scope of the privilege against self-incrimination." Kastigar v. United States, 406 U.S. 441, 453 (1972) (emphasis added). Although *Kastigar* discusses the protection that is required before the government can compel testimony by an immunized witness claiming the privilege against self-incrimination, the scope of the protection should be no narrower when the defendant's privilege is being protected. *See also* United States v. Bounos, 693 F.2d 38, 40 (7th Cir. 1982) (holding that use and derivative use immunity is all that is required for the protection of defendants testifying at a double jeopardy hearing).

68. An independent source exception developed in "fruits of the poisonous tree" cases. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the case in which the "fruits" doctrine was unveiled, the Court noted that information obtained in two distinct manners, only one of which was illegal, could be used.

Some lower courts have extended the exception to cases in which the prosecution can show that the evidence or information would inevitably have been discovered through usual investigatory techniques. *See, e.g.,* United States v. Huberts, 637 F.2d 630, 638-39 (9th Cir. 1980), *cert. denied,* 451 U.S. 975 (1981); United States v. Brookins, 614 F.2d 1037, 1041-42 (5th Cir. 1980). The Supreme Court has not ruled directly on this extension but has stated in a footnote that "evidence of where the body was found . . . might well be admissible on the theory that the body *would have been discovered in any event* . . . ." Brewer v. Williams, 430 U.S. 387, 406-07 n.12 (1977) (emphasis added).

The independent source rule "should not be permitted to emasculate the exculsionary rule." Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 627 (1968). Although the inevitable discovery extension "has a certain appeal, . . . it collides with the fundamental purpose of the exculsionary rule. The ability of police scientists, laboratory technicians, and investigators to discover, analyze, and develop substantial leads from minute materials appears to make even the most implausible discovery virtually inevitable." *Id.* at 630.

69. Kastigar v. United States, 406 U.S. 441, 460-61 (1972).

70. *Cf.* Maness v. Meyers, 419 U.S. 449, 460 (1975) (recognizing that it is not always possible to " 'unring the bell' once the information has been released.").

71. The doctrine of attenuation holds that the taint on the evidence dissipates when the causal connection between the illegal activity and the information obtained becomes tenuous. Thus, the fruits of the illegal conduct may be used. *See* Brown v. Illinois, 422 U.S. 590 (1975).

ance struck in *Simmons* may still violate the defendant's privilege against self-incrimination. "The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements . . . and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion."[72] Although restrictions on use, derivative use, and impeachment use of defendant's testimony may secure the second facet of the privilege, such restrictions do not protect the first. The privilege in its entirety is fulfilled "only when a person is guaranteed the right to 'remain silent unless he chooses to speak in the unfettered exercise of his own will.' "[73] Thus, the fifth amendment does more than guarantee that compelled testimony will not be used, directly or indirectly, against the accused. The fifth amendment also grants to the defendant a right not to be *compelled* to testify against himself.[74]

One might argue that the defendant has not been compelled to give up his privilege against self-incrimination but has instead *chosen* to testify in order to gain the benefit of his double jeopardy protection. However, "[when] the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created."[75] That tension may effectively compel the defendant to testify.[76]

Even if the state's interests in fourth amendment suppression hearings are important enough to outweigh the defendant's interest in avoiding self-incrimination, the state's interest in the double jeopardy context is less substantial.[77] Moreover, the general criticism of the *Simmons* balance and the particular problems arising in double jeopardy claims[78] require that a different balance be struck. The courts should minimize the defendant's compulsion to testify by re-

72. Murphy v. Waterfront Commn., 378 U.S. 52, 57 n.6 (1964).

73. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

74. Greenwalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 34-43 (1981), argues that even aside from the fifth amendment right an individual has a moral right to remain silent in the criminal process.

75. Simmons v. United States, 390 U.S. 377, 394 (1968).

76. Compulsion is impermissible even if it is not physical. The Supreme Court has found violations of the right against compelled testimony in the custodial interrogation of a suspect without counsel. Miranda v. Arizona, 384 U.S. 436 (1966). The Court recognized the effectiveness of psychological factors in producing confessions and expressed its disapproval of "friendly-unfriendly" or "Mutt and Jeff" tactics, 384 U.S. at 452, and the interrogator "patiently maneuver[ing] himself or his quarry into a position from which the desired objective may be attained." 384 U.S. at 455 (quoting F. INBAU & J. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)); *see also* Brewer v. Williams, 430 U.S. 387 (1977) (speech by a detective aimed at the conscience of an arrestee held to constitute compulsion). The Supreme Court has also held, in New Jersey v. Portash, 440 U.S. 450 (1979), that immunized testimony before a grand jury is coerced testimony.

77. *See* text at note 61 *supra*.

78. *See* text at note 65-76 *supra*.

quiring the government to bear the burden of proof when the defendant raises a nonfrivolous double jeopardy claim.

3. *Prosecution Discovery*

Even if the defendant does not testify, requiring him to bear the burden of proof causes problems. To carry this burden, the defendant must do more than simply refute the government's evidence. He must offer evidence on the factual issues involved and show that the two crimes charged are legally and factually identical. Such a requirement permits the prosecution to discover the defendant's case in chief.[79] This discovery is not an opportunity that the prosecutor would normally have.[80]

Placing the defendant in a position where he must reveal any part of his defense conflicts with his constitutional rights. "Indeed, it has been traditionally supposed that discovery by a prosecutor in a criminal case would constitute a plain violation of the privilege against self-incrimination."[81] This is not to say that courts will never allow prosecution discovery; it does, however, indicate that special circumstances will be required before discovery is permitted.

The Supreme Court identified these special circumstances in *Williams v. Florida*,[82] which upheld a Florida rule that a defendant must provide notice of any alibi that he plans to offer at trial. The Court recognized that even this limited discovery created a compelled testimony problem, but nevertheless upheld the rule because it "only compelled [the defendant] to accelerate the timing of his disclosure. . . . [T]he Fifth Amendment privilege [does not entitle] a defendant . . . to await the end of the State's case before announcing the nature of his defense."[83] Permissible discovery is designed to eliminate surprise exculpatory evidence[84] and is limited "to material

79. *See* 3 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 252 (1978), where defense counsel are warned to draft carefully motions to suppress evidence so as not to disclose factual theories of the defense that underlie the motions. It is feared that the police, in their desire to sustain arrests, searches and confessions, will conform their testimony to fit whatever theory will validate their conduct. A similar concern should arise when the prosecution is in a position to structure its case in chief based on what was learned of the defendant's theories at a pretrial hearing on a double jeopardy claim.

80. "Rule 16, the general discovery provision [of the Federal Rules of Criminal Procedure], applies only to defendants." *In re* Magnus, Mabee & Reynard, Inc., 311 F.2d 12, 15 (2d Cir. 1962), *cert. denied*, 373 U.S. 902 (1963); *see also* United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965) ("[T]he Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution.").

81. AMSTERDAM, *supra* note 79, at § 274.

82. 399 U.S. 78 (1970).

83. 399 U.S. at 85.

84. *See* United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972) (holding that permissible discovery rules are those intended to eliminate surprise regarding exculpatory evidence, not to force the production of incriminating evidence).

that the defendant intends to produce at trial."[85]

The information that is discoverable under the *Williams* rule differs from that which can be obtained from the defendant's testimony in a double jeopardy hearing. In that situation, the nature of the defense is known to the prosecution — the defendant is claiming that the double jeopardy clause bars a second trial. Moreover, in the course of substantiating this objection, the defendant may be forced to produce facts and reveal theories that he might never have offered at trial. Courts should protect the defendant from prosecutorial discovery, minimizing his evidentiary production by placing the burden of proof on the government.

C. *Scope of the Proposed Rule*

There are, then, several constitutional and practical bases from which to argue that the burden of proof in a double jeopardy claim should be on the government. The practical bases run to certain situations in which defendants would be unable to carry the burden of proof even if they deserved to prevail on their claims. Based solely upon the practical bases, the scope of the rule shifting the burden of proof would be limited to cases in which practical problems actually make it difficult for the defendant to carry the burden.

The constitutional bases stand beside and strengthen the access to proof rationale offered by the courts that have shifted the burden to the government. These bases, however, do not have the same limits as the practical considerations. Because they are not grounded on the unique problems inherent in conspiracies, the constitutional bases mandate a rule that the burden of proof should be on the government for *all* double jeopardy claims turning on a question of fact.[86]

III. Distinguishing Collateral Estoppel

An issue related to double jeopardy is collateral estoppel or issue preclusion.[87] Under this principle, when an issue of ultimate fact[88]

85. Amsterdam, *supra* note 79, at § 274 (basing the claim on *Williams* and Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962)); *see also* United States v. Allen, 337 F. Supp. 1041, 1043 (E.D. Pa. 1972) ("[T]he Government may discover (when it may discover at all) only . . . evidence 'which the defendant intends to produce at trial.' ").

86. Because the fifth amendment has been incorporated against the states, *see* Benton v. Maryland, 395 U.S. 784 (1969), a shift based on constitutional imperatives would also alter the allocation of the burden in state prosecutions.

87. The phrases "collateral estoppel" and "issue preclusion" are interchangeable. *See* F. James & G. Hazard, Civil Procedure 563 (2d ed. 1977) ("This . . . effect of a judgment was called 'collateral estoppel' and is now called 'issue preclusion.' ").

88. In The Evergreens v. Nunan, 141 F.2d 927, 928 (2d. Cir. 1944), Judge Learned Hand explained the difference between ultimate facts and mediate or evidentiary facts:

> [A] "fact" may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose

has been determined by a valid and final judgment, it cannot be relitigated by the same parties in a future action.[89] Although the principle was first developed in civil litigation,[90] the Supreme Court in *United States v. Oppenheimer*[91] held that the principle also applied to criminal actions.[92] Since then, the Court has elevated the protection to a constitutional level, holding in *Ashe v. Swenson*[93] that collateral estoppel is covered by the double jeopardy clause.[94]

In civil litigation, the burden of proof in collateral estoppel is clearly on the party that asserts the principle.[95] The expansion of the doctrine to the criminal arena brought with it the burden of proof rule.[96] Because the burden of proof in criminal collateral estoppel lies with the defendant and because the collateral estoppel claim is analogous to a defendant's claim of double jeopardy,[97] the argument that the government should bear the burden of proof as to double jeopardy is enhanced by any distinction that may be drawn between

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combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an "ultimate" fact; the second, a "mediate datum." "Ultimate" facts are those which the law makes the occasion for imposing its sanctions.

Elsewhere it has been explained that ultimate facts are facts essential to the court's decision. People *ex rel.* Hudson & M.R. Co. v. Sexton, 44 N.Y.S. 2d 884, 885 (1944).

89. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

90. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

91. 242 U.S. 85 (1916).

92. Justice Holmes stated that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U.S. at 87.

93. 397 U.S. 436 (1970). Ashe was charged with and tried for robbing one of six poker players, all of whom had been robbed at the same time by a group of three or four men. The jury found the evidence presented by the prosecutor insufficient and the defendant not guilty. He was then charged with the robbery of another of the poker players and was convicted. The court held that since the jury in the first trial had determined that Ashe had not been one of the robbers, the issue could not be relitigated.

94. 397 U.S. at 445. For discussions of collateral estoppel and double jeopardy see Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965); Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

95. *See* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.408[1] at 293 (2d ed. 1983) (finding authority in a line of civil cases stretching back to 1876).

96. *See, e.g.,* United States v. Giarrantano, 622 F.2d 153, 156 n.4 (5th Cir. 1980); United States v. Clark, 613 F.2d 391, 400 (2d Cir. 1979), *cert. denied,* 449 U.S. 820 (1980); United States v. Lasky, 600 F.2d 765, 769 (9th Cir. 1979), *cert. denied,* 444 U.S. 979 (1979); United States v. Davis, 460 F.2d 792, 796 (4th Cir. 1972); Moore v. United States, 460 F.2d 558, 559-60 (D.C. Cir. 1965).

97. It has been argued that only a defendant may invoke collateral estoppel in criminal cases. Chief Justice Burger, dissenting in *Ashe v. Swenson*, stated that "courts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to *both* parties . . . ." 397 U.S. at 464-65 (emphasis in original). Since *Ashe v. Swenson*, however, several courts have applied collateral estoppel to criminal defendants. *See, e.g.,* Hernandez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975); United States v. Colacurcio, 514 F.2d 1 (9th Cir. 1975); People v. Ford, 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966), *cert. denied,* 385 U.S. 1018 (1967); Carmody v. Seventh Judicial Dist. Court, 81 Nev. 83, 398 P.2d 706 (1965). The Supreme Court has not yet ruled on the issue of whether the use of collateral estoppel against a defendant is constitutional. Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 314 (1980).

the two principles.[98]

A. *Distinguishing Collateral Estoppel From Double Jeopardy*

The Court in *Ashe v. Swenson*[99] was concerned that changes in criminal law and judicial interpretation were eroding the protection afforded by the guarantee against double jeopardy.[100] The Court sought to stem that erosion by including collateral estoppel within the guarantee against double jeopardy.[101] The elevation of collateral estoppel to a constitutional level was based not on a desire to provide an additional constitutional right, but rather to protect an already existing one.[102] The court had earlier declined to rule that collateral estoppel was itself a guarantee constitutionally mandated by due process.[103] Its use as a means of furthering another constitutional guarantee leaves open the possibility that the procedural protections afforded by collateral estoppel are less extensive than those afforded by the double jeopardy clause itself.

Indeed, differences in the approaches used to examine collateral estoppel and double jeopardy claims suggest differences in the procedural protections required by each. In considering a claim of collateral estoppel, the court must " 'examine the record of a *prior*

98. Alternatively, one might contend that the burden of proof rule used in civil collateral estoppel should not have been applied when the principle expanded into criminal procedure. That argument, however, is beyond the scope of this Note.

99. 397 U.S. 436 (1970).

100. The Court noted that:

> at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. . . . In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction.

397 U.S. at 445 n.10.

The "same offense" test, as presented in Blockburger v. United States, 284 U.S. 299 (1932), also served to erode the protection from double jeopardy. Only when the evidence required to convict on one offense was also sufficient to convict on another would the offenses be considered the same for double jeopardy purposes. 284 U.S. at 304. "Such a test can lead to an extremely restrictive application of the double jeopardy rule. Very few separate offenses arising in a given situation will require exactly the same evidence in order to convict the defendant." *Recent Developments: Constitutional Law — Double Jeopardy*, 69 MICH. L. REV. 762, 768 (1971).

101. *See* 397 U.S. 445 n.10.

102. The opinion in *Ashe v. Swenson* continued to refer to collateral estoppel as a "rule of federal law" and held that it is embodied in the fifth amendment because the double jeopardy guarantee "protects a man who has been acquitted from having to 'run the gauntlet' a second time." 397 U.S. at 445-46. The protection afforded by collateral estoppel would serve to further that double jeopardy guarantee. 397 U.S. at 445 n.10. By holding that collateral estoppel was embodied in the fifth amendment guarantee, the states would be required to adopt the principle, *see* Benton v. Maryland, 395 U.S. 784 (1969), and the double jeopardy guarantee would be strengthened. Had collateral estoppel remained merely a rule of federal procedure, it would not have been binding on state courts.

103. *See* Hoag v. New Jersey, 356 U.S. 464, 471 (1958).

proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' "[104] The court must examine only the pleadings in the second trial.[105] The limited scope of this inquiry distinguishes collateral estoppel from double jeopardy proceedings turning upon questions of fact, where both the prior proceeding *and* the facts relevant to the second crime charged must be examined.[106] This distinction provides the rationale for different allocations of the burden of proof in the two circumstances.

B. *Justifying Different Allocations of the Burden of Proof*

The courts that have shifted the burden of proof to the government in double jeopardy claims have in large part justified the shift by noting the defendant's lack of access to proof and the inability to grant witness immunity.[107] Since consideration of a collateral estoppel claim requires an examination only of the *record* of the prior proceeding and the pleadings in the second trial, the access to proof and witness immunity problems do not arise. Collateral estoppel requires production of no evidence beyond that already produced in the first trial.

A second justification for shifting the burden of proof to the government is the argument that a protection should not be defeated by the procedure required to invoke it.[108] Although the defendant's protected interest in avoiding a second trial may be defeated if the court imposes upon him the burden of proof in a double jeopardy claim,[109] a similar allocation of burdens does not have the same effect on a collateral estoppel claim. Since the court need only ex-

104. Ashe v. Swenson, 397 U.S. 436, 444 (1970) (quoting Mayers & Yarbrough, *supra* note 94, at 38-39) (emphasis added).

105. *See, e.g.,* Ashe v. Swenson, 397 U.S. 436, 446 (1970) (at trial for robbery of one of six participants in a poker game "jury determined by its verdict that petitioner was not one of the robbers"; therefore, the State "could certainly not have brought him to trial again on [the] charge" that he robbed another of the victims). While it seems clear that the court need only consider the pleadings in the second trial, it is equally clear that, as a practical matter, courts will often not be presented with the issue until the second trial has occurred. Under these circumstances, the courts consider the record of the subsequent proceeding as well. *See, e.g.,* Ashe v. Swenson, 397 U.S. 436, 439-40 (1970); United States v. Nash, 447 F.2d 1382, 1384 (4th Cir. 1971).

106. It should be noted that double jeopardy claims can be decided on the pleadings when the outcome turns on a question of law. *See, e.g.,* Illinois v. Sommerville, 410 U.S. 458 (1973) (retrial after a mistrial); Bartkus v. Illinois, 359 U.S. 121 (1959) (reprosecution by a different sovereign); Green v. United States, 355 U.S. 184 (1957) (retrial on original charge after conviction on lesser included offense set aside).

107. *See* text at notes 32-38 *supra*.

108. *See* text at notes 32-56 *supra*.

109. *See* text at notes 10-14 *supra*.

amine the record of the prior proceeding, the involvement of *each* party is limited to the presentation of its analysis of that proceeding.

The courts have also justified shifting the burden to the government in double jeopardy claims by identifying the possible conflict between putting the burden on the defendant and the defendant's privileges against self-incrimination, as well as problems posed by impermissible prosecutorial discovery.[110] Again, only prior proceedings are examined when collateral estoppel claims are raised. The court's examination of the verdict and the pleadings will not require the defendant to incriminate himself and will not force him to reveal facts and potential theories before trial.

Although one might argue that the burden of proof in criminal collateral estoppel should also be placed on the government, the differences in what a court must consider in each case allow for differing placements. It is the prospective element inherent in double jeopardy claims, the consideration of the facts surrounding the crime charged in the second trial, that leads to the conflict with the defendant's rights and the need to shift the burden of proof. Because claims of collateral estoppel warrant retrospective examination, their procedural treatment should be distinct from that afforded double jeopardy claims.

CONCLUSION

In cases in which double jeopardy claims turn on a question of fact, the burden of proof should be on the government. Several courts have rejected the traditional rule that places the burden of proof on the defendant, reasoning that the government has, among other advantages, superior access to proof. Constitutional considerations also warrant placing the burden on the government. These constitutional arguments, combined with practical concerns, mandate that the burden of proof in double jeopardy claims be shifted to the government in all cases that turn on a question of fact.

110. *See* text at notes 57-67 *supra*.